SUPREME COURT, U. S.

112

No. [redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

DIFCO LABORATORIES, INC., Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on February 20, 1968.

OPINIONS BELOW

The decision of the Court of Appeals (Appendix A, *infra*) is reported at 389 F.2d 663. The Decision and Order of the National Labor Relations Board (Appendix B, *infra*) is reported at 154 N.L.R.B. 921. The Supplemental Decision and Certification of Representative issued in N.L.R.B. Case No. 7-RC-6383 is attached as Appendix C (Joint Appendix*, pp. 56a-65a). The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1) and Section (10e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

QUESTION PRESENTED

Did the Court below err in ruling that the Petitioner was not entitled to a hearing upon the substantial and material issues of fact raised by the Petitioner in its Objections to Conduct of Election?

STATUTES AND REGULATIONS INVOLVED

The relevant statutory provisions and relevant provisions of the Rules and Regulations of the National Labor Relations Board are set forth in Appendix D, *infra*.

STATEMENT

On September 18, 1964, an election was held by the Regional Director, Region Seven, of the National Labor Relations Board, among the employees of the Company's Tissue Culture Laboratory (Department 35) employees. The Union won the election (Appendix C, *infra*, p. 35).

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*The Joint Appendix is part of the record as certified by the Court below.

The Company filed objections to the election, contending that "the employees were not given free and untrammeled opportunity to vote under the so-called laboratory conditions required by the Board" for, *inter alia,* the following reasons:

(1) That notwithstanding the fact that the Board's Decision and Direction of Election dated August 24, 1964 and the Notice of Election issued September 11, 1964, which was posted on September 14, 1964, stated that those eligible to vote were the employees of the Tissue Culture Laboratory (Department 35), the Union and its representatives misrepresented to employees in other departments and laboratories that they were eligible to vote. As a result and in defiance of instructions that they were to remain at their work, such ineligible employees gathered in a group at the entrance to the voting place shortly before the election period opened at 4:00 p.m. and thereby created a scene of the greatest confusion and disorder. Such ineligible employees then crowded into the election area and remained there until all of them had voted and been challenged. As a result, many of the employees who were eligible to vote were frightened and confused and deprived of their opportunity to vote calmly and rationally.

(2) That the Board's Notice of Election was issued on September 11, 1964, and received by the Employer on September 14, 1964. No preliminary instructions had been issued with regard to election procedures, including the settling of the list of

eligible voters. On September 15, 1964, the Employer received a letter from the Board stating that the payroll list for the period ending Friday, August 14, 1964, should be sent to the offices of the Board for inspection by the Union on the day preceding the election. On September 16, 1964, the Employer's attorney sent the Board a list, by regular mail with postage prepaid, with letter of explanation as to the differences between the list produced at the hearing on August 14, 1964, and the list reflecting the payroll period ending Friday, August 14, 1964. So far as is known to the undersigned, no effort was made by the Board or by the Union to resolve the questions raised by the discrepancies between the two lists. The brief period of time allowed between the sending of the Notice of Election and the holding of the election itself, and the failure of the Board and the Union to attempt to resolve questions of eligibility of voters, contributed to the confusion and misunderstanding of the employees and to the creation of the disturbance which occurred immediately prior to and during the election as described above.

(3) That on the day of the election, the Union and its representatives circulated a rumor, widely believed by the employees throughout the plant, that if the Union failed to win the election, all of the employees in Department 35, the Tissue Culture Laboratory, would be discharged and that accordingly, the only protection for their jobs was to vote the Union in as their representative.

A hearing was requested on these Objections (Joint Appendix pp. 52a.-54a).

The Regional Director considered the objections through an administrative investigation. He concluded that the objections failed to raise any substantial or material issues and upheld the validity of the election (Appendix C, *infra*). A timely request for review was filed by the Company with the Board of the Regional Director's Decision "for the reasons stated in the Employer's Objections to Conduct of Election." (Joint Appendix, pp. 67a-68a). This request was denied (Joint Appendix, p. 68a).

The Court of Appeals held that while "the matter of confusion surrounding a representation election is highly relevant to the validity of the election," the Company's objections in the instant case were insufficiently specific to require the Regional Director to hold a hearing. The Court went on to say that the Company's request for review was likewise unspecific and did not meet the requirements of the Board's Regulations* with respect to review. The Board's request for enforcement was granted.

REASONS FOR GRANTING THE WRIT

1. It Is Petitioner's Contention That the Board's Petition Should Not Have Been Enforced Because Petitioner Has Been Denied a Hearing on Timely Post-Election Objections Which Raise Substantial and Material Issues of Fact.

*29 C.F.R. §102.67(c) (2) and §102.67(d); Appendix D, p. 63.

The proposition is well-established that an employer is entitled to a hearing on timely post-election challenges which raise substantial and material factual issues. *United States Rubber Company v. N.L.R.B.*, 373 F.2d 602 (5th Cir. 1967); *N.L.R.B. v Capital Bakers, Inc.*, 351 F.2d 45 (3rd Cir. 1965) *N.L.R.B. v. Joclin Mfg. Co.*, 314 F.2d 627 (2nd Cir. 1963); *N.L.R.B. v. Lord Baltimore Press, Inc.*, 300 F.2d 671 (4th Cir. 1962); *N.L.R.B. v. Dallas City Packing Co.*, 230 F.2d 708 (5th Cir. 1956); *N.L.R.B. v. Poinsett Lumber and Mfg. Co.*, 221 F.2d 121 (4th Cir. 1956).

The Board's Rules and Regulations provide for a hearing on objections which raise substantial and material factual issues.*

In addition, basic concepts of due process demand a hearing on contested factual issues. *N.L.R.B. v. Capital Bakers, Inc., supra,* 351 F.2d at p. 51. As stated by this court in *N.L.R.B. v. Indiana & Michigan Electric Co., et al,* 318 U.S. 9, 28 (1942):

> The Act accords a great degree of finality to the Board's findings of fact, and this Court has been insistent that the admonition of the Act be strictly observed. But courts which are required upon a limited review to lend their enforcement powers to the Board's orders are granted some discretion to see that the hearings out of which the conclusive findings emanate do not shut off a party's right to produce evidence or conduct cross-examination material to the issue. The statute demands respect

*C.F.R. §102.69(c); Appendix D, p. 70.

> for the judgment of the Board as to what the evidence proves. But the Court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed.

More importantly, none of the evidence which was relied upon by the Regional Director was subject to cross-examination or confrontation or to any legal tests as evidence. *N.L.R.B. v. Capital Bakers, Inc., supra,* 351 F.2d at p. 50. As Chief Justice Hughes stated in *Morgan v. U.S.,* 304 U.S. 1, 18 (1937):

> The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them.

In the present case, there can be little doubt that the Objections raised substantial and material issues of fact, if their allegations were sustained. The Court of Appeals seems to admit this to be true when it remarks that the matter of confusion surrounding an election is highly relevant to its validity.

The Regional Director did not conclude as a matter of law that if the Objections were true, no hearing was required. His Supplemental Decision and Certification of Representative (Appendix C) is an extensive and lengthy review of the facts disclosed to him by his *ex parte* investigation. Essentially argumentative in tone, it concludes

that "any confusion or disorder that existed" (Appendix C, p. 43) was not attributable to the Union or the Board's agents. As we shall show, the question is whether the election was conducted in accordance with the Board's own strict standards, not who was responsible for the objectionable conduct which impaired those standards.

Since there were substantial and material issues of fact, Petitioner is entitled to a hearing on them. This case is unlike *N.L.R.B. v. Air Control Products,* 335 F.2d 245 (5th Cir. 1964). In that case, the Regional Director, assuming that the Objections were true, concluded as a matter of law that no hearing was required. *N.L.R.B. v. Tennessee Packers, Inc.,* 379 F2.d 172 (6th Cir. 1967) is likewise a case in which the exceptions did not "state specifications or indicate that material factual issues" existed (p. 178). The present case is similar in principle to *N.L.R.B. v. Capital Bakers, Inc., supra.*

2. The Election Should Have Been Set Aside Under the Board's Own Standards of Conduct.

Petitioner's objections constitute a basis for setting aside the election by the Board's own standards. *General Shoe Corporation,* 77 N.L.R.B. 124; *Sewall Manufacturing,* 138 N.L.R.B. 66; *Hollywood Ceramics Co.,* 140 N.L.R.B. 221. In *General Shoe Corporation, supra, t*he Board stated:

> Conduct that creates an atmosphere which renders improbable free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. An election can serve its true purpose only if the surrounding conditions enable employees to register

> a free and untrammeled choice for or against a bargaining representative. (p. 126)

In *Sewall Manufacturing, supra,* 138 N.L.R.B. at p. 70, the Board also said:

> Where for any reason the standard falls too low, the Board will set aside the election and direct a new one. Unsatisfactory conditions for holding elections may be created by . . . a general atmosphere of fear and confusion created by a participant or by members of the general public.

The Regional Director's Supplemental Decision and Certification of Representative (Appendix C) is largely devoted to exonerating the Union and Board agents from the commission of conduct which impaired the employees' freedom of choice. It is essentially a finding of fact on the basis of an administrative investigation that any confusion or disorder which occurred was attributable to the Employer, and that if threats were made, the Union was not responsible for them. This decision falls far short of meeting the standards established by the Board for the conduct of an election. No matter who was responsible, the election should have been set aside.

3. Respondent's Objections To the Conduct Of the Election Were Sufficiently Specific To Meet the Requirements Of Law and the Board's Rules and Regulations.

We suggest that the Court below misinterpreted the provisions of the Board's Rules and Regulations (*infra,* Appendix D).

Section 102.69(a), Appendix D, p. 68, of the Board's Rules and Regulations requires only that objections to the conduct of an election contain "a short statement of the reasons therefor". Respondent's objections, which requested a hearing, certainly met this standard.

Section 102.67(d), Appendix D, p. 63, of the Rules and Regulations relied on by the Court below deals with the requirements of a request for review and is set in a context which presupposes a hearing conducted in accordance with §§102.64, Appendix D, p. 56, and 102.66, Appendix D, p. 59, It would obviously have been impossible for Petitioner to buttress its request with references to the "evidence . . . together with page citations from the transcript..." There was no evidence and no transcript which is precisely why the Petitioner is here seeking a hearing. Compliance with Section 102.76(d) is directly related to and depends upon a prior hearing.

No basis exists in the Regulations, or otherwise, for the statement that Petitioner was required to submit affidavits to the Board in support of its request for review. The Regional Director was evidently satisfied with his own *ex parte* investigation. The Board did not request Petitioner to submit such affidavits. In any case, this does not satisfy the due process concept which includes the right to confront witnesses and of cross-examination. It has become increasingly recognized by our courts generally, when adopting rules of procedure, that discovery is essential to full presentation of evidence.

Nor is there any statement in the Regulations as to the degree of specificity required. The regulation, as we have pointed out, requires that objections be accompanied

by a "short" statement of reasons. There is no requirement that evidentiary detail be supplied. The Objections filed by Petitioner were lengthy and detailed. They are not conclusory statements. They are, if anything, more specific than necessary to raise the legal issue of the validity of the election.

Lastly, while we recognize that it is Board policy to settle questions of representation promptly, the Regional Director's Supplemental Decision and Certification of Representative was issued on November 10, 1964 (Appendix C, p. 46), more than six weeks after the Objections were filed (Joint Appendix, p. 54a). This allowed ample time for the hearing requested by Petitioner and, had it been held, this problem would not have occurred. The delay must be laid at the door of the Board, not that of Petitioner.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
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DATED: May 20, 1968

APPENDIX A

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

DIFCO LABORATORIES, INC., Respondent

No. 17315

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT

February 20, 1968

Before O'SULLIVAN and McCREE, Circuit Judges, and WEINMAN, District Judge.

McCREE, Circuit Judge.

This case is before us on a petition by the National Labor Relations Board for enforcement of an order affirming its trial examiner's summary determination that Difco Laboratories, Inc., a manufacturer of biological materials and supplies, unlawfully refused to bargain with the representative[1] of two different units of its employees, in violation of sections 8(a) (5) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 8(a) (1), 8(a) (5). The decision and order of the Board are reported at 154 N.L.R.B. No. 75. Difco contends that, in two previous representation cases, the Board erred in determining the appropriateness and composition of the units involved here, and that the Board further erred in failing to conduct a hearing on Difco's objections to the election held in one of the representation cases.

In July, 1964, the union filed a representation petition seeking certification as bargaining representative of a unit consisting of Difco's tissue culture laboratory (Department 35) employees. At a hearing held on the

[1] Oil, Chemical and Atomic Workers International Union, Local 7-389, AFL-CIO.

petition, the parties stipulated that the facts concerning the Department 35 employees were the same as those found in a 1960 representation proceeding. The 1960 proceeding is reported in Difco Laboratories, Inc., 129 N.L.R.B. 887. In the 1960 proceeding, the United Automobile, Aircraft and Agricultural Implement Workers of America (UAW) sought to represent the Department 35 employees as part of a unit of technical employees. The Board determined, however, that the Department 35 employees were not technical employees but were a residual group of production employees which could be added to a unit of production employees already represented by the UAW. The Board directed an election to determine whether the Department 35 employees desired to be added to the existing production unit, and the union lost.

In the July, 1964 proceeding, over the objection of the employer that the Department 35 employees should be added to the existing production unit, the Regional Director found that the UAW no longer claimed an interest in representing these employees, and held that the employees constituted a residual production unit which could appropriately be represented by the union here involved. An election was directed. Difco sought Board review of the Regional Director's decision and direction of election on the grounds that the director had departed from Board precedent, had based his determination upon the extent of union organization in violation of Section 9(c) (5) of the Act, 29 U.S.C. § 159(c) (5), and had improperly fractionalized an integrated unit. Review was denied, and the union won the election which was held on September 18, 1964.

Difco filed objections to the election, contending that "the employees were not given the free and untrammeled

opportunity to vote under the so called laboratory conditions required by the Board'' for the following four reasons:

1. That notwithstanding the fact that the Board's Decision and Direction of Election dated August 24, 1964, and the Notice of Election issued September 11, 1964, which was posted on September 14, 1964, stated that those eligible to vote were the employees of the Tissue Culture Laboratory (Department 35), the Union and its representatives misrepresented to employees in other departments and laboratories that they were eligible to vote. As a result and in defiance of instructions that they were to remain at their work, such ineligible employees gathered in a group at the entrance to the voting place shortly before the election period opened at 4 p.m. and thereby created a scene of the greatest confusion and disorder. Such ineligible employees then crowded into the election area and remained there until all of them had voted and been challenged. As a result, many of the employees who were eligible to vote were frightened and confused and deprived of their opportunity to vote calmly and rationally.

2. That the Board's Notice of Election was issued on September 11, 1964, and received by the Employer on September 14, 1964. No preliminary instructions had been issued with regard to election procedures, including the settling of the list of eligible voters. On September 15, 1964, the Employer received a letter from the Board stating that a payroll list for the period ending Friday, August 14, 1964, should be sent to the offices of the Board for inspection by the Union on the day preceding the election. On September 16, 1964, the

Employer's attorney sent the Board a list, by regular mail with postage prepaid, with a letter of explanation as to the differences between the list produced at the hearing on August 14, 1964, and the list reflecting the payroll period ending Friday, August 14, 1964. So far as is known to the undersigned, no effort was made by the Board or by the Union to resolve the questions raised by the discrepancies between the two lists. The brief period of time allowed between the sending of the Notice of election and the holding of the election itself, and the the failure of the Board and the Union to attempt to resolve questions of eligibility of voters, contributed to confusion and misunderstanding of the employees and to the creation of the disturbance which occurred immediately prior to and during the election as described above.

3. That on the day of the election, the Union and its representatives circulated a rumor, widely believed by the employees throughout the plant, that if the Union failed to win the election, all of the employees in Department 35, the Tissue Culture Laboratory, would be discharged and that accordingly the only protection for their jobs was to vote the Union in as their representative.

4. That the election is void because the unit established by the Decision and Direction of Election dated August 24, 1964, is erroneous for the reasons stated in the Employer's Request for Review dated August 28, 1964, and filed with the Board.

A hearing was requested on these objections, but the Regional Director chose to consider them through an administrative investigation. He stated in his supplemental decision that "All parties were afforded full

opportunity to be heard, to produce witnesses, and to submit evidence bearing on the issues." On the basis of his investigation, the Regional Director concluded, with regard to the first three objections, that if any confusion existed, it could not be attributed to actions of the union, and that, in any event, the employees were not denied the free exercise of their franchise. With regard to the fourth objection, the Regional Director concluded that the appropriateness of the unit had already been considered by the Board, which had denied review of the unit determination, and could not be considered as an objection to the election. Difco requested review by the Board of the Regional Director's decision on the election objections "for the reasons stated in the Employer's Objections to Conduct of Election." This request was denied.

In November, 1964, the union filed a representation petition seeking certification as bargaining representative for all technical employees in Difco's Departments 36, 42, and 43. This unit had been found by the Board to be appropriate in the 1960 proceeding referred to previously, and the parties in the present case stipulated to the appropriateness of the unit. Difco contended, however, that eleven of the employees which the union sought to represent were properly classifiable as professional rather than technical employees, and that in accordance with section 9(b) (1) of the Act, 29 U.S.C. § 159(b) (1), these eleven employees could not be included in the unit unless they had first indicated their desire to be so included. Six of these employees had been determined to be technical employees during the 1960 proceeding, and the Regional Director found that their duties had not substantially changed. One employee, Vera Boricic, had been classified as a professional employee during the earlier proceeding,

but the Director determined that the evidence introduced during the earlier proceeding concerning Boricic's educational background had been erroneous, and he therefore classified her as a technical employee. Three employees were found by the Director to be involved in work not substantially different from that of others classified as technical. The remaining employee, Janet Booth, was allegedly hired by Difco with the expectation that she would eventually engage in professional work, but the Director determined that at the time of the hearing she was properly classified as a technical employee. Finding no merit in Difco's contentions, the Director ordered an election, which was won by the union. Difco's request that the Board review the direction of election was denied on the ground that it had been untimely filed.

Difco refused to bargain with the union selected by its employees in the two representation proceedings above described, and was therefore found to have violated sections 8(a) (5) and (1) of the Act, this violation being the basis for the bargaining order which the Board here seeks to have enforced. Difco's substantive defenses are essentially those which were raised in the representation proceedings, and Difco also contends that a hearing was improperly denied during the July proceeding.

The finding of the Board in the July representation case with regard to the appropriateness of the unit consisting of Difco's Department 35 production employees must be affirmed unless it can be said to be arbitrary or capricious or unless it violates some specific provision of the Act. See, e. g., N.L.R.B. v. Prudential Ins. Co. of America, 154 F.2d 385 (6th Cir. 1946); N.L.R.B. v. Merner Lumber and Hardware Co., 345 F.2d 770 (9th Cir. 1965), cert. denied, 32 U.S. 942, 86 S.Ct. 397, 15 L.Ed2d 352

(1965). The finding of the Board that the unit is an appropriate residual unit of production employees is supported by substantial evidence. See Westinghouse Air Brake Co., 119 NLRB 1391; Holiday Hotel, 134 NLRB 113. It is therefore not arbitrary, nor does it violate section 9(c) (5), which prohibits the Board from regarding the extent of union organization as the controlling factor in making a unit determination. Furthermore, we find that the evidence of the educational background and the nature of the work performed by the employees whose status was in dispute in the November proceeding provides substantial support for the Board's conclusion that these employees were not professional.

With regard to the necessity of conducting a full hearing on an employer's objections to an election, Board Regulations provide:

> If the election has been conducted pursuant to a direction of election issued following any proceeding under § 102.67 [as was done in this case], the regional director may (1) issue a report on objections or challenged ballots, or both, as in the case of a consent election pursuant to § 102.62(b), or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election. In either instance, such action by the regional director may be on the basis of an administrative investigation, or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, on the basis of a hearing before a hearing officer, designated by the regional director. 29 C.F.R. § 102.69(c).

The Board's rule that a hearing be held only if "substantial and material" factual issues are raised has been

described as "a requirement not only proper but necessary to prevent dilatory tactics by employers or unions disappointed in the election returns." N.L.R.B. v. Joclin Mfg. Co., 314 F.2d 627, 632 (2d Cir. 1963). The question presented here is whether Difco's objections, as previously set out in full, present issues which are substantial and material. There can be no doubt that the matter of confusion surrounding a representation election is highly relevant to the validity of the election. It has been held, however, that in order to require a hearing, it is necessary that the party making the request offer "specific evidence of specific events from or about specific people" which would tend to support the objections. N.L.R.B. v. Douglas County Electric Membership Corp., 358 F.2d 125 (5th Cir. 1966). While there must be limits to what an objecting party can be required to offer in order to render a hearing necessary, it is not unreasonable to demand a certain degree of specificity in order to prevent unjustifiable delays. In the instant case, it is doubtful that Difco's conclusory statements concerning the confusion existing at the plant, unaccompanied by affidavits or other exhibits tending to support these conclusions, would require the regional director to hold a hearing. There is, in any event, a sufficient procedural ground for enforcing the order of the Board.

Difco's complaint is not simply that no hearing was provided by the Regional Director, but rather that no hearing was provided at any stage of the proceedings. This argument implies, we think correctly, that the crucial question is whether a party is given a fair opportunity to present its case, and not whether this opportunity occurs at some particular stage. See N.L.R.B. v. Capital Bakers, Inc., 351 F.2d 45, 51 (3d Cir. 1965). Once the Regional Director has rendered his decision, an objecting party is free to seek

review by the Board, and although Board regulations severely limit the scope of review,[2] the Board is permitted to grant review on the ground "That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party." 29 C.F.R. § 102.67(c) (2). These regulations also provide that when an objection is based on an alleged factual error, the request for review "must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument." 29 C.F.R. § 102.67 (d). In the instant case, Difco requested review "for the reasons stated in Employer's Objections to Conduct of Election." Although the Regional Director had offered the parties an opportunity to provide him with whatever evidence they considered relevant, the request for review made no reference at all to the evidence upon which Difco relied or to the manner in which Difco regarded the Regional Director as having erred. Without such references, it is difficult to see how the Board could find that Difco had been prejudiced by denial of a hearing. Even the denial of the opportunity to cross-examine the Board's witnesses would not necessarily prove that prejudice had resulted, since Difco would have had to produce some evidence of its own to sustain its objections to the election. Hence, Difco itself must bear the responsibility for not having obtained review by the Board of the Regional Director's alleged errors. Cf. N.L.R.B. v. Tennessee Packers, Inc., Frosty Morn Division, 379 F.2d 172, 178 (6th Cir. 1967).

The order is enforced.

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[2] 29 C.F.R. § 102.67.

APPENDIX B

DECISION AND ORDER
(Case No. 7-CA-5189)

On June 22, 1965, Trial Examiner Lowell Goerlich issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the Trial Examiner's Decision and the entire record in this case, including the exceptions of the Respondent, and hereby adopts the findings, conclusions, [1]and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Difco Laboratories, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

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[1]See O. K. Van and Storage, Inc., 127 NLRB 1537, 1539, enfd. 297 F. 2d 74 (C.A. 5).

Dated, Washington, D.C., September 1, 1965.

Frank W. McCulloch, Chairman
Howard Jenkins, Jr., Member
Sam Zagoria, Member
(Seal) National Labor Relations Board

TRIAL EXAMINER'S DECISION
(Case No. 7-CA-5189)

Statement of the Case

On a charge duly filed on May 4, 1965, by Local 7-389, International Union, Oil, Chemical and Atomic Workers, AFL-CIO, herein called the Union, the General Counsel of the National Labor Relations Board by the Acting Regional Director for the Seventh Region issued a complaint, together with a notice of hearing dated May 6, 1965, copies of which were duly served upon the parties. The complaint alleges, in substance that Difco Laboratories, Inc., herein called the Respondent, refused to bargain with the Union in violation of Section 8(a)(1) and (5) of the Act in that the Respondent did refuse and continues to refuse to recognize the Union and bargain with it as the exclusive collective-bargaining representative of all the employees in appropriate units certified by the Acting Regional Director on November 10, 1964, and April 6, 1965, in Case No. 7-RC-6383 and Case No. 7-RC-6582 respectively. The Respondent filed an amended answer dated May 27, 1965, in which it admitted the service of the charge and that the Respondent was a corporation duly organized under and existing by virtue of the laws of the State of Michigan, that its principal place of business was at 920 Henry, Detroit, Michigan, that it was engaged in the manufacture, sale and

distribution of biological and bacteriological media, materials and supplies, that the Respondent was and is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that the Union was and is, a labor organization within the meaning of Section 2(5) of the Act. The Respondent denied that it was violating either Section 8(a)(1) or 8(a)(5) of the Act. As affirmative defenses the Respondent alleged in its amended answer that in respect to Case No. 7-RC-6383, the unit certified therein was not an appropriate unit for the purposes of collective bargaining as determined in the Decision and Direction of Election; that the Decision and Direction of Election in said case was based upon the extent of organization as controlling contrary to Section 9(c)(5) of the Act; that the election conducted on September 18, 1964, pursuant to such Decision and Direction of Election was improperly conducted in that the employees eligible to vote therein were improperly influenced by the Union and its representatives as a result of which, the employees were not given the free and untrammeled opportunity to vote according to their free will and choice at said election; that the Respondent's Objections to Conduct of Election filed raised substantial and material issues of fact upon which the Respondent was unlawfully denied a hearing by the Acting Regional Director; and that the Respondent's Request For Review of the Supplemental Decision and Certification of Representatives filed with the Board was improperly and unlawfully denied. The Respondent further answered that the Decision and Direction of Election in Case No. 7-RC-6582 was erroneous in that 11 employees in the unit found appropriate were professional employees and not technical employees; that the Board erred in refusing the Respondent's Request For Review; and that the certification issued

by the Acting Regional Director on April 16, 1965, certifying the Union as the collective bargaining representative of employees in the unit found appropriate was in error and should be vacated. On June 1, 1965, the General Counsel filed and served a Motion For Summary Judgment On Pleadings.

On June 4, 1965, I issued and caused to be served on all the parties an Order directing the Respondent on or before June 18, 1965, in writing, to show cause why the issues raised in the proceeding herein should not be resolved without any further hearing and why the Motion For Summary Judgment On Pleadings should not be granted and in due course an appropriate Trial Examiner's Decision be prepared and issued. The Order further provided that if the Respondent believed that there were any genuine issues open for decision and not already pleaded or decided by the Board in Case No. 7-RC-6383 and 7-RC-6582 the same should be set forth in writing by June 1, 1965, in the form of an offer of proof of the additional relevant facts upon which the Respondent relied. In response to the Order To Show Cause, I received Respondent's Answer to Order To Show Cause dated June 15, 1965, in which the Respondent stated that in opposition to the Motion for Summary Judgment on Pleadings of the counsel for the General Counsel and in answer to the Order to Show Cause, the Respondent rested upon the grounds stated in Respondent's answer filed in these proceedings. A copy of Respondent's Objections to Conduct of Election filed in Case No. 7-RC-6383 was attached to the Answer to Order To Show Cause and referred to therein.

In its amended answer to the complaint the Respondent admitted that on April 23, 1965, it transmitted a letter to the Union stating that after a conference with the company officials, it had been determined to contest the various rulings of the National Labor Relations Board made in connection with Case No. 7-RC-6383 and Case No. 7-RC-6582 and "Accordingly, in order to present the issue for determination, we are compelled to refuse your request for meetings at this time."

It appearing, therefore, that there are no issues of fact herein requiring a hearing before the Trial Examiner for the purposes of issuing a decision, I deem this case submitted for decision on the pleadings, the motion, papers and the records in Case No. 7-RC-6383 and Case No. 7-RC-6582. The hearing herein heretofore set for July 12, 1965, 10 a.m. (EST) is hereby cancelled, and I make the following:

Rulings on the Motion

The issues raised by Respondent's amended answer and Answer to Order To Show Cause were previously raised and determined by the Board in the underlying representation cases, 7-RC-6383 and 7-RC-6582. It is well settled that such issues, absent newly discovered evidence none of which is offered here, may not relitigated in this case.[1]

It is apparent from the foregoing that there are no factual issues litigable before me. Accordingly, the General Counsel's Motion is granted on the basis of the entire record herein, including the representation cases, and I hereby make the following:

Findings of Fact

I. Jurisdiction

The Respondent is a Michigan corporation engaged at 920 Henry, Detroit, Michigan, in the manufacture, sale and distribution of biological and bacteriological media, materials, and supplies. During the calendar year 1964, which period is representative of its operations, the Respondent purchased and caused to be transported and delivered at its Detroit place of business materials and supplies valued in excess of $50,000 which were transported and delivered to its Detroit place of business directly from points located outside the State of Michigan and the Respondent manufactured, sold and distributed at its Detroit place of business products valued in excess of $50,000 which were shipped from said place of business directly to points located outside the State of Michigan. I find that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organization involved

The Union is a labor organization as defined in Section 2(5) of the Act.

III. The unfair labor practices

A. The representation proceeding

1. The units

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[1]Pittsburg Plate Glass Co. v. N.L.R.B., 313 U.S. 146 (1941); Metropolitan Life Insurance Company, 141 NLRB 337, enfd. 328 F. 2d 820 (C.A. 3); Metropolitan Life Insurance Company, 141 NLRB 1074, enfd. 330 F. 2d 62 (C.A. 6); Esquire, Inc., 109 NLRB 530, 538-539, enfd. 222 F. 253 (C.A. 7).

All employees in the tissue culture laboratory (Department 35) of the Respondent's Detroit place of business, excluding all other employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All technical employees in Departments 36, 42, and 43 of the Respondent's Detroit place of business, excluding production and maintenance employees, tissue culture laboratory employees, office clerical employees, salesmen, professional employees, guards and supervisors as defined in the Act, and all other employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.[2]

2. The certification

On September 18, 1964, a majority of the employees in the unit found appropriate in Case No. 7-RC-6383 by a secret ballot election conducted under the supervision of the acting Regional Director designated and selected the Union as their representative for the purposes of collective bargaining with the Respondent. Thereafter, on September 24, 1964, the Respondent filed Objections to Conduct of Election and on November 10, 1964, the Acting Regional Director

[2]These units were found to have been appropriate for the purposes of collective bargaining by the Acting Regional Director for the Seventh Region in Case No. 7-RC-6383 and in Case No. 7-RC-6582, respectively. On September 11, 1964, the Board denied the Respondent's Request For Review of the Decision and Direction of Election in Case No. 7-RC-6383 and on March 12, 1965, the Board denied the Respondent's Request For Review of the Decision and Direction of Election in Case No. 7-RC-6582. The appropriateness of the units may not be relitigated in a related subsequent unfair labor practice proceeding. Board's Rules & Regulations Section 102.67(f).

issued his Supplemental Decision overruling Respondent's Objections to Conduct of Election and certified the Union as the exclusive bargaining representative of employees in the above-described unit. On November 7, 1964, the Respondent filed a Request For Review with the Board of the Supplemental Decision and Certification of Representative above referred to and on December 14, 1964, the Board denied Respondent's Request For Review.

On March 29, 1965, a majority of the employees in the unit found to be appropriate in Case No. 7-RC-6582 by a secret ballot election conducted under the supervision of the Acting Regional Director designated and selected the Union as their representative for the purposes of collective bargaining with the Respondent. On April 6, 1965, the Acting Regional Director certified the Union as the exclusive bargaining representative of the employees in the above-described unit. The Union continues to be the exclusive collective-bargaining representative of the employees in the above described units.

3. The request to bargain and the Respondent's refusal

On or about April 12, 1965, and continuing thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all employees in the above-described appropriate units. On or about April 23, 1965, Respondent did refuse, and continues to refuse, to recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of all employees in said unit.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in section III, occurring in connection with its operations set forth in section I, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondent has engaged, and is engaging in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact and the entire record in the case, including the representation proceedings, I make the following:

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All employees in the tissue culture laboratory (Department 35) of the Respondent's Detroit place of business, excluding all other employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. All technical employees in Departments 36, 42, and 43 of the Respondent's Detroit place of business, excluding production and maintenance employees, tissue culture laboratory employees, office clerical employees, salesmen, professional employees, guards and supervisors as defined in the Act and all other employees constitute a unit approxiate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. Since on or about April 12, 1965, the Union has been, and is, the exclusive bargaining representative for the purposes of collective bargaining of employees in the units described above.

6. By refusing to bargain collectively with the Union as the exclusive representative of the employees in the above appropriate units on or about April 23, 1965, and thereafter, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this case and in the representation proceedings, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I recommend that the Respondent Difco Laboratories, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 7-389, International Union, Oil, Chemical and Atomic Workers, AFL-CIO, as the exclusive bargaining representative of its employees in the following units:

> All employees in the tissue culture laboratory (Department 35) of the Respondent's Detroit place of business, excluding all other employees, guards and supervisors as defined in the Act.
>
> All technical employees in Departments 36, 42, and 43 of the Respondent's Detroit place of business, excluding production and maintenance employees, tissue culture laboratory employees, office clerical employees, salesmen, professional employees, guards and supervisors as defined in the Act, and all other employees.

(b) Interfering with the efforts of Local 7-389, International Union, Oil, Chemical and Atomic Workers, AFL-CIO, to negotiate for or represent the employees in the said appropriate units as the exclusive bargaining agent.

2. Take the following affirmative action, which it is found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local 7-389, International Union, Oil, Chemical and Atomic Workers, AFL-CIO, as the exclusive representative of all the employees in the appropriate unit described above with respect to rates of pay, wages, hours of employment and other conditions of employment and if an understanding is reached embody such understanding in a signed agreement.

(b) Post at its Detroit place of business copies of the notice attached hereto and marked "Appendix."[3] Copies

of said notice to be furnished by the Regional Director for the Seventh Region, shall after being duly signed by Respondent's representatives be posted by it immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicious places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Seventh Region, in writing, what steps the Respondent has taken to comply herewith.[4]

Dated at Washington, D.C. June 22, 1965.

(s) Lowell Goerlich
Trial Examiner

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO THE RECOMMENDED ORDER OF A TRIAL EXAMINER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act we hereby notify our employees that:

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[4]In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of the United States Court of Appeals, the words, "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

We Will Not refuse to bargain collectively with Local 7-389, International Union, Oil, Chemical and Atomic Workers, AFL-CIO, as the exclusive representative of the employees in the bargaining units described below. We Will Not interfere with the efforts of Local 7-389, International Union, Oil, Chemical and Atomic Workers, AFL-CIO, to negotiate for or represent as exclusive bargaining agent the employees in the bargaining units described below.

We Will upon request, bargain with the above-named union, as the exclusive bargaining representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other conditions of employment, and if an understanding is reached, embody such an understanding in a signed agreement.

The bargaining units are:

All employees in the tissue culture laboratory (Department 35) of the Respondent's Detroit place of business, excluding all other employees, guards and supervisors as defined in the Act.

All technical employees in Departments 36, 42, and 43 of the Respondent's Detroit place of business excluding production and maintenance employees, tissue culture employees, office clerical employees,

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[4]In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

salesmen, professional employees, guards and supervisors as defined in the Act, and all other employees.

Difco Laboratories, Inc.
(Employer)

Dated..... By.....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 500 Book Building, 1249 Washington Boulevard, Detroit, Michigan 48226 (Tel. No. 226-3244).

APPENDIX C

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

(Case No. 7-RC-6383)

Pursuant to a Decision and Direction of Election issued by the Acting Regional Director of the Seventh Region on August 21, 1964, an election by secret ballot was conducted on September 18, 1964, among the employees in the following appropriate collective bargaining unit:

> All employees in the tissue culture laboratory (department 35) of the Employer's Detroit, Michigan, establishment, excluding all other employees, guards, and supervisors as defined in the Act.

The payroll period for eligibility was the period ending August 14, 1964. The result of the election, as set forth in the Tally of Ballots, were as follows:

Approximate number of eligible voters	29
Void ballots	0
Votes cast for Petitioner	22
Votes cast against participating labor organization	2
Valid votes counted	24
Challenged ballots	19
Valid votes counted plus challenged ballots	43

The challenged ballots were not sufficient in number to affect the results of the election.

On September 24, 1964, the Employer timely filed Objections to Conduct of Election, and a copy was duly served upon the Petitioner. The Employer alleged that "the employees were not given the free and untrammeled op-

portunity to vote under the so-called laboratory conditions required by the Board'' for the following reasons:

1. That notwithstanding the fact that the Board's Decision and Direction of Election dated August 24, 1964 and the Notice of Election issued September 11, 1964, which was posted on September 14, 1964, stated that those eligible to vote were the employees of the Tissue Culture Laboratory (Department 35), the Union and its representatives misrepresented to employees in other departments and laboratories that they were eligible to vote. As a result and in defiance of instructions that they were to remain at their work, such ineligible employees gathered in a group at the entrance to the voting place shortly before the election period opened at 4 p.m. and thereby created a scene of the greatest confusion and disorder. Such ineligible employees then crowded into the election area and remained there until all of them had voted and been challenged. As a result, many of the employees who were eligible to vote were frightened and confused and deprived of their opportunity to vote calmly and rationally.

2. That the Board's Notice of Election was issued on September 11, 1964, and received by the Employer on September 14, 1964. No preliminary instructions had been issued with regard to election procedures, including the settling of the list of eligible voters. On September 15, 1964, the Employer received a letter from the Board stating that a payroll list for the period ending Friday, August 14, 1964, should be sent to the offices of the Board for inspection by the Union on the

day preceding the election. On September 16 the Employer's attorney sent the Board a list, by regular mail with postage prepaid, with a letter of explanation as to the differences between the list produced at the hearing on August 14, 1964, and the list reflecting the payroll period ending Friday, August 14, 1964. So far as it is known to the undersigned, no effort was made by the Board or by the Union to resolve the questions raised by the discrepancies between the two lists. The brief period of time allowed between the sending of the Notice of Election and the holding of the election itself, and the failure of the Board and the Union to attempt to resolve questions of eligibility of voters, contributed to the confusion and misunderstanding of the employees and to the creation of the distrubance (sic) which occurred immediately prior to and during the election as described above.

3. That on the day of the election, the Union and its representatives circulated a rumor, widely believed by the employees throughout the plant, that if the Union failed to win the election, all of the employees in Department 35, the Tissue Culture Laboratory, would be discharged and that accordingly the only protection for their jobs was to vote the Union in as their representative.

4. That the election is void because the unit established by the Decision and Direction of Election dated August 24, 1964, is erroneous for the reasons stated in the Employer's Request for Review dated August 28, 1964 and filed with the Board.

In accordance with the provisions of Section 102.69 of the Board's Rules and Regulations, an investigation of the aforesaid Objections was conducted under the direction and supervision of the undersigned Acting Regional Director. All parties were afforded full opportunity to be heard, to produce witnesses, and to submit evidence bearing upon the issues. Upon the basis of this investigation, and upon the entire record in this case, the undersigned hereby issues the following report:

Objections 1 and 2

Since the facts involved in the first two objections of the Employer are interrelated, these objections will be considered together. Essentially, the Employer contends in these two objections that the confusion that occurred before and during the election as to which employees were eligible to vote therein deprived employees of their opportunity to vote in a calm and rational atmosphere and was attributable to a failure on the part of the Board and the Petitioner to resolve questions of the eligibility of the voters. The Petitioner takes the position that what confusion, if any, that may have existed at the polling was caused by the Employer rather than the Petitioner, and that none of the employees were deprived of their rights to properly cast their ballots. Further, the Petitioner contends that the poor cooperation of the Employer in supplying the Board and the Petitioner with a copy of the eligibility list sufficiently in advance of the election deprived both the Board and the Petitioner of an opportunity to question and resolve the discrepancies that existed between the eligibility list supplied by the Employer for the election and the list of employees supplied by the Employer at the representation hearing.

The facts, as disclosed by the investigation, in regard to these two objections are as follows: At the representation hearing held in this case on August 14, 1964, the parties stipulated as to the appropriateness of the unit involved herein; namely, all employees in the tissue culture laboratory (Department 35). This unit was the same as the residual unit found appropriate by the Board in a prior case involving the same Employer, reported at 129 NLRB 887, as amended by Orders of the Board dated December 23 and 29, 1960. The prior case also involved a self-determination election in a unit of technical employees employed in various departments denominated as Departments 36, 42 and 43.[1] At the representation hearing in the instant case, the Employer presented for the record, and the Petitioner stipulated thereto, a list of 49 names of employees who allegedly comprised the employees of Department 35. As later developed, this list was in error and included Department 42 employees as well as Department 35 employees.[2]

Shortly after the issuance of the Decision and Direction of Election herein on August 21, 1964, a representative of the Regional Office contacted the Employer's attorney regarding election arrangements, at which time the Employer agreed to send the eligibility list to the Regional Office in advance of the election and indicated that the Petitioner could view said list only in the Regional Office the day

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[1]This election resulted in the choice of no collective bargaining representative, as did the election in Department 35 held at that same time.

[2]Although the petition filed by the Petitioner herein does not clearly limit the unit sought to Department 35, the petition as amended at the hearing limited the unit to Department 35 employees. The employees of Deparments 36 and 43—approximately five or six in number—who work on the second floor of the Employer's plant, were not among the 49 names. The employees of Departments 35 and 42 all work on the fourth floor of Employer's plant.

before the election. These arrangements were subsequently confirmed by the Board Agent assigned to conduct the election by letter dated September 14, 1964, which letter is attached hereto as Appendix "A." When the eligibility list was not received by the morning of September 17, 1964, the day before the election, the Board Agent so notified Employer's attorney, who had a copy of the eligibility list delivered to the Regional Office shortly after noon the same day, along with a copy of Employer's letter explaining the reduction in the number of eligible employees from 49 to 29—a facsimile of which is attached hereto as Appendix "B."[3] It was at this point that the Board Agent was first appraised of the fact that the eligibility list submitted by the Employer contained 20 names less than the list read into the record and agreed upon at the representation hearing. The Board Agent thereupon notified Petitioner of this difference in the number of potential votes.

Thus, it appears that until the afternoon before the election both the Board, the Petitioner, and the employees of the Employer assumed that the unit involved herein contained 49, rather than approximately 29, employees. Employees testified that up until the election they thought that the election involved Departments 36, 42, and 43 in addition to Department 35. The Notices of Election herein, which defined the unit as restricted to Department 35, were posted by the Employer on September 15, 1964. However, the employees—as well as the Petitioner—erroneously assumed that all 49 employees were to be included in Department

[3]The original of this letter and the eligibility list was received by the Regional Office by regular mail on the morning of September 18, 1964, after the election had already begun. The first polling session was held from 6:15 a.m. to 6:30 a.m. that day, this polling session having been added prior to the election to accommodate night-shift employees.

35. This assumption, as far as Departments 35 and 42 are concerned, was not completely unwarranted in view of the hearing stipulation relative to the eligibility of 49 employees, and the fact that Departments 35 and 42 employees work in close proximity doing similar types of work with some of the latter appearing on Department 35's payroll (See Appendix "B").

The morning polling session of the election on September 18, 1964, for night-shift employees was conducted without incident. However, by the time of the principal polling session in the afternoon, which was scheduled for 4:00 p.m. to 4:30 p.m., the employees had generally become aware of the more restricted voting list. After the morning polling session, Petitioner's observer called representatives of the Petitioner to inquire as to the rights of the employees not included on the list, indicating that these employees desired to vote but were afraid to come up to the polls individually because supervisors of the Employer had threatened them with discharge if they did so. Petitioner's representatives indicated that if the employees wanted to vote, they could gather in a group and vote their ballots under challenge.

At approximately 4:00 p.m. on the day of the election many of the potential voters who had not voted in the morning—both those on the eligibility list and those not included thereon—assembled at the desk of an office clerical employee located in a hallway on the fourth floor of Employer's plant. The group of employees gathered at the clerical's desk numbered anywhere from 18 up to 40. The voting was taking place in an enclosed conference room at least 20 yards down a hallway from this desk and out of sight of the desk. At this juncture two supervisors of the

Employer attempted to persuade those employees who were not on the eligibility list to return to their jobs and even threatened disciplinary action if they did not do so. However, despite the confusion among the employees caused by the statements of the supervisors, for the most part the employees remained and moved in a group to the polling area where they lined up to vote.

The investigation revealed that the actual balloting at the polling place proceeded without incident and was conducted in an orderly fashion. Due to the prior incident at the clerical's desk in the hallway and the rumored threats of discharge discussed below in connection with Objection 3, there were a number of questions directed by the voters to the Board Agent conducting the election. However, the voters lined up and voted in order with the 19 challenged voters being taken in turn among those whose names appeared on the eligibility list. There is no evidence of any unusual disorder at the polling place itself, nor is there any indication that any employee was deprived of an opportunity to cast a ballot.

There is no evidence that Petitioner misrepresented to the employees the scope of the unit but, on the contrary, it appears that the Petitioner erroneously assumed with the employees that a broader unit was involved. Under the facts outlined above, the confusion that existed among the employees and the Petitioner at the time of the election as to who was eligible to vote in the election cannot be attributed to any misrepresentation by Petitioner, but can more properly be attributed to the Employer's incorrect eligibility list submitted at the hearing, to the Employer's delay in furnishing a corrected eligibility list, and to the

Employer's giving Petitioner insufficient opportunity prior to the election to survey said list. The Employer was contacted by agents of the undersigned well in advance of the election in regard to election arrangements, and at that time by its own decision chose to restrict the Petitioner's view of the eligibility list to the day before the election. The subsequent delay by the Employer in furnishing this list did not afford the Board or the Petitioner with an adequate opportunity prior to the election to resolve the discrepancy in the number of employees eligible to vote, nor did it give Petitioner an opportunity to clear up any misunderstanding on the part of the employees, assuming Petitioner had any obligation under the circumstances to do so.

The undersigned does not find herein any conduct by Petitioner or on the part of the Board agents which in any way impaired the employees' freedom of choice in the election. Any confusion or disorder that existed in the hallway at the time of the election did not in any way deny any employee who presented himself at the polls of an opportunity to vote, nor can it be reasonably concluded that Petitioner or the Board's agents were in any way responsible for any such disorder or confusion. Further, the undersigned concludes that the incident in the hallway did not create a general atmosphere of confusion or fear of reprisal which rendered impossible a free election. Therefore, the undersigned concludes that Employer's Objections 1 and 2 are without merit and they are hereby overruled.[4]

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[4]Sewanee Coal Operators' Ass'n., Inc., 146 NLRB No. 140, p. 4. See also Jat Transportation Corp., 131 NLRB-122, 124.

Objection 3

The Employer contends in this objection that the Petitioner and its representatives were responsible for a rumor on the day of the election that some or all of the employees of Department 35 would be discharged if Petitioner failed to win the election. Petitioner denies telling any employee that he would be discharged if Petitioner did not win the election, but, on the contrary, indicates that it informed employees of their right to freely engage in union activity.

The investigation revealed that on the day of the election and during the week prior thereto, there were rumors among a number of the employees that certain employees would be discharged if the Petitioner did not win the election. The rumors were usually directed at the four to six employees who were allegedly the leaders in the organizational attempt by the Petitioner. While the Petitioner was informed of the rumors, there is no evidence that it or its representatives were in any way responsible for them. On the contrary, the employees testify that to their knowledge the rumors originated among employees of the Employer.

It appears clear that such a threat, coming from rank-and-file employees with no evidence of any authority, can clearly be evaluated by the remaining employees as impossible of fruition without employer participation and, accordingly, there was no atmosphere of confusion and fear of reprisal present sufficient to constitute interference with the free expression of the voters. The undersigned finds that these rumors, under the circumstances herein, do not warrant setting the election aside and concludes, therefore,

that Employer's Objection 3 is without merit and it is hereby overruled.[5]

Objection 4

In this objection, the Employer contends that the election was void because the unit established by the Decision and Direction of Election herein was erroneous for the reasons stated in the Employer's August 28, 1964 Request for Review. The subject matter of this objection was considered and disposed of by the Board's denial on September 11, 1964 of the Employer's Request for Review and cannot at this time be the basis of an objection to the election.[6] Therefore, Employer's Objection 4 is overruled.

Conclusion

On the basis of the foregoing, the undersigned overrules the objections of the Employer in their entirety in that they fail to raise any substantial or material issues with respect to the conduct of the election.

CERTIFICATION OF REPRESENTATIVE

On the basis of the foregoing, and pursuant to the authority vested in the undersigned by Section 102.69 of the Rules and Regulations, Series 8, as amended, of the National Labor Relations Board, it is hereby certified that the Oil, Chemical and Atomic Workers International Union, Local 7-389, AFL-CIO has been designated and selected by a majority of the employees of the above-named employer

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[5]See Shoreline Enterprises of America, 114 NLRB 716, 718. See also Dornback Furnace & Foundary Co., 115 NLRB 350, 353; W. A. Ransom Lumber Co., 114 NLRB 1418, 1421.

[6]The Beechnut Life Savers Co., Inc., 118 NLRB 851; Burrus Mills, Inc., 116 NLRB 1257.

in the unit herein involved as their representative for the purposes of collective bargaining, and that, pursuant to Section 9(a) of the Act, as amended, the said organization is the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Dated at Detroit, Michigan, this 10th day of November, 1964.

(s) Jerome H. Brooks,
Acting Regional Director
National Labor Relations Board
Seventh Region
500 Book Building
1249 Washington Boulevard
(Seal) Detroit, Michigan 48226.

APPENDIX D

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Sec. 9. (a) Representatives designated or selected for

* * * * *

the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

Sec. 10 * * * (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this

section, . . . the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

The relevant provisions of the Rules and Regulations of the National Labor Relations Board are as follows:

SUBPART C—PROCEDURE UNDER SECTION 9(c) OF THE ACT FOR THE DETERMINATION OF QUESTIONS CONCERNING REPRESENTATION OF EMPLOYEES[3]

§ 102.60(a) *Petition for certification or decertification; who may file; where to file; withdrawal.*—A petition for investigation of a question concerning representation of employees under paragraphs (1) (A) (i) and (1) (B) of section 9(c) of the act (hereinafter called a petition for certification) may be filed by an employee or group of employees or any individual or labor organization acting in their behalf or by an employer. A petition under paragraph (1) (A) (ii) of section 9(c) of the act, alleging that the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no longer such representative (hereinafter called a petition for decertification), may be filed by any employee or group of employees or any individual or labor organization acting in their behalf. Petitions under this section shall be in writing and signed,[4] and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to admin-

[3]Procedure under the first proviso to sec. 8(b)(7)(C) of the act is governed by subpart D.

[4]Blank forms for filing such petitions will be supplied by the regional office upon request.

ister oaths and take acknowledgements or shall contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. Four copies of the petition shall be filed. Except as provided in section 102.72, such petitions shall be filed with the regional director for the region wherein the bargaining unit exists, or, if the bargaining unit exists in two or more regions, with the regional director for any of such regions. Prior to the transfer of the case to the Board, pursuant to section 102.67, the petition may be withdrawn only with the consent of the regional director with whom such petition was filed. After the transfer of the case to the Board, the petition may be withdrawn only with the consent of the Board. Whenever the regional director or the Board, as the case may be, approves the withdrawal of any petition, the case shall be closed.

(*b*) *Petition for clarification of bargaining unit or petition for amendment of certification under section 9(b) of the Act; who may file; where to file; withdrawal.*—A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question concerning representation, may be filed by a labor organization or by an employer. Where applicable the same procedures set forth in paragraph (a) of this section shall be followed.

§ 102.61 *Contents of petition for certification; contents of petition for decertification.*—(a) A petition for certification, when filed by an employee or group of employees or an individual or labor organization acting in their behalf, shall contain the following:

(1) The name of the employer.

(2) The address of the establishments involved.

(3) The general nature of the employer's business.

(4) A description of the bargaining unit which the petitioner claims to be appropriate.

(5) The names and addresses of any other persons or labor organizations who claim to represent any employees in the alleged appropriate unit, and brief descriptions of the contracts, if any, covering the employees in such unit.

(6) The number of employees in the alleged appropriate unit.

(7) A statement that the employer declines to recognize the petitioner as the representative within the meaning of section 9(a) of the act or that the labor organization is currently recognized but desires certification under the act.

(8) The name, affiliation, if any, and address of the petitioner.

(9) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(10) Any other relevant facts.

(b) A petition for certification, when filed by an employer, shall contain the following:

(1) The name and address of the petitioner.

(2) The general nature of the petitioner's business.

(3) A brief statement setting forth that one or more individuals or labor organizations have presented to the

petitioner a claim to be recognized as the exclusive representative of all employees in the unit claimed to be appropriate; a description of such unit; and the number of employees in the unit.

(4) The name or names, affiliation, if any, and addresses of the individuals or labor organizations making such claim for recognition.

(5) A statement whether the petitioner has contracts with any labor organization or other representatives of employees and, if so, their expiration date.

(6) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(7) Any other relevant facts.

(c) Petitions for decertification shall contain the following:

(1) The name of the employer.

(2) The address of the establishments and a description of the bargaining unit involved.

(3) The general nature of the employer's business.

(4) Name and address of the petitioner and affiliation, if any.

(5) Name or names of the individuals or labor organizations who have been certified or are being currently recognized by the employer and who claim to represent

any employees in the unit involved, and the expiration date of any contracts covering such employees.

(6) An allegation that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative in the appropriate unit as defined in section 9(a) of the act.

(7) The number of employees in the unit.

(8) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(9) Any other relevant facts.

(d) A petition for clarification shall contain the following:

(1) The name of the employer and the name of the recognized or certified bargaining representative.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) A description of the present bargaining unit, and, if the bargaining unit is certified, an identification of the existing certification.

(5) A description of the proposed clarification.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees affected by the proposed clarifications, and brief descriptions of the contracts, if any, covering any such employees.

(7) The number of employees in the present bargaining unit and in the unit as proposed under the clarification.

(8) The job classifications of employees as to whom the issue is raised, and the number of employees in each classification.

(9) A statement by petitioner setting forth reasons why petitioner desires clarification of unit.

(10) The name, the affiliation, if any, and the address of the petitioner.

(11) Any other relevant facts.

(e) A petition for amendment of certification shall contain the following:

(1) The name of the employer and the name of the certified union involved.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) Identification and description of the existing certification.

(5) A statement by petitioner setting forth the details of the desired amendment and reasons therefor.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees in the unit covered by the certification and brief descriptions of the contracts, if any, covering the employees in such unit.

(7) The name, the affiliation, if any, and the address of the petitioner.

(8) Any other relevant facts.

§ 102.62 *Consent-election agreements.*—(a) Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of employees involved may, with the approval of the regional director, enter into a consent-election agreement leading to a determination by the regional director of the facts ascertained after such consent election. Such agreement shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such consent election shall be consistent with the method followed by the regional director in conducting elections pursuant to sections 102.69 and 102.70 except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board, provided further that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(b) Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement providing for a waiver of hearing and a consent

election leading to a determination by the Board of the facts ascertained after such consent election, if such a determination is necessary. Such agreement shall also include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such election and the postelection procedure shall be consistent with that followed by the regional director in conducting elections pursuant to sections 102.69 and 102.70.

§ 102.63 *Investigation of petition by regional director; notice of hearing; service of notice; withdrawal of notice.*

(a) After a petition has been filed under § 102.61(a), (b), or (c), if no agreement such as that provided in § 102.62 is entered into and if it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the act will be effectuated, and that an election will reflect the free choice of employees in the appropriate unit, the regional director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein. A copy of the petition shall be served with such notice of hearing. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion.

(b) After a petition has been filed under § 102.61(d)

or (e), the regional director shall conduct an investigation and, as appropriate, he may issue a decision without a hearing; or prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein; or take other appropriate action. If a notice of hearing is served, it shall be accompanied by a copy of the petition. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion. All hearing and posthearing procedure under this paragraph (b) shall be in conformance with § § 102.64 through 102.68 whenever applicable, except where the unit or certification involved arises out of an agreement as provided in § 102.62(a), the regional director's action shall be final, and the provisions for review of regional director's decisions by the Board shall not apply. Dismissals of petitions without a hearing shall not be governed by § 102.71. The regional director's dismissal shall be by decision, and a request for review therefrom may be obtained under § 102.67, except where an agreement under § 102.62(a) is involved.

§ 102.64 *Conduct of hearing.*—(a) Hearings shall be conducted by a hearing officer and shall be open to the public unless otherwise ordered by the hearing officer. At any time, a hearing officer may be substituted for the hearing officer previously presiding. It shall be the duty of the hearing officer to inquire fully into all matters in issue and necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under section 9(c) of the act.

(b) The hearing officer may, in his discretion, continue the hearing from day to day, or adjourn it to a later date or to a different place, by announcement thereof at the hearing or by other appropriate notice.

§ 102.65 *Motions, interventions.* — (a) All motions, including motions for intervention pursuant to paragraph (b) of this section, shall be in writing or, if made at the hearing, may be stated orally on the record and shall briefly state the order or relief sought and the grounds for such motion. An original and four copies of written motions shall be filed and a copy thereof immediately shall be served on the other parties to the proceeding. Motions made prior to the transfer of the case to the Board shall be filed with the regional director, except that motions made during the hearing shall be filed with the hearing officer. After the transfer of the case to the Board, all motions shall be filed with the Board. Such motions to the Board shall be printed or otherwise legibly duplicated: Provided, however, That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Eight copies of such motions shall be filed with the Board. The regional director may rule upon all motions filed with him, causing a copy of said ruling to be served on the parties, or he may refer the motion to the hearing officer: Provided, That if the regional director prior to the close of the hearing grants a motion to dismiss the petition the petitioner may obtain a review of such ruling in the manner prescribed in section 102.71. The hearing officer shall rule, either orally on the record or in writing, upon all motions filed at the hearing or referred to him as hereinabove provided, except that all motions to dismiss petitions shall be referred for appro-

priate action at such time as the entire record is considered by the regional director or the Board, as the case may be.

(b) Any person desiring to intervene in any proceeding shall make a motion for intervention, stating the grounds upon which such person claims to have an interest in the proceeding. The regional director or the hearing officer, as the case may be, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as he may deem proper, and such intervenor shall thereupon become a party to the proceeding.

(c) All motions, rulings, and orders shall become a part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved, as provided in section 102.66(c). Unless expressly authorized by the Rules and Regulations, rulings by the regional director or by the hearing officer shall not be appealed directly to the Board, but shall be considered by the Board on appropriate appeal pursuant to section 102.67(b), (c), and (d) or whenever the case is transferred to it for decision; Provided, however; That if the regional director had issued an order transferring the case to the Board for decision, such rulings may be appealed directly to the Board by special permission of the Board. Nor shall rulings by the hearing officer be appealed directly to the regional director, unless expressly authorized by the Rules and Regulations, except by special permission of the regional director, but shall be considered by the regional director when he reviews the entire record. Requests to the regional director, or to the Board in appropriate cases,

for special permission to appeal from such rulings of the hearing officer shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each of the other parties and on the regional director.

(d) The right to make motions or to make objections to rulings on motions shall not be deemed waived by participation in the proceeding.

§ 102.66 *Introduction of evidence; rights of parties at hearing; subpenas.*—(a) Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.

(b) Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection shall be deemed waived by further participation in the hearing.

(c) Any party may file applications for subpenas in writing with the regional director if made prior to hearing, or with the hearing officer if made at the hearing. Applications for subpenas may be made ex parte. The regional director or the hearing officer, as the case may be, shall forthwith grant the subpenas requested. Any person served with a subpena, whether *ad testificandum*

or *duces tecum,* if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena, petition in writing to revoke the subpena. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer: Provided, however, That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpena was issued. The regional director or the hearing officer, as the case may be, shall revoke the subpena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpena is otherwise invalid. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of unlawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them.

(d) (1) Misconduct at any hearing before the regional director or the Board shall be ground for summary exclusion from the hearing.

(2) Such misconduct of an aggravated character, when

engaged in by an attorney or other representative of a party, shall be ground for suspension or disbarment by the Board from further practice before it after due notice and hearing.

(3) The refusal of a witness at any such hearing to answer any question which has been ruled to be proper shall, in the discretion of the hearing officer, be ground for striking all testimony previously given by such witness on related matters.

(e) Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing.

(f) The hearing officer may submit an analysis of the record to the regional director or the Board but he shall make no recommendations.

(g) Witness fees and mileage shall be paid by the party at whose instance the witness appears.

Sec. 102.67 Proceedings before the regional director; further hearing; briefs; action by the regional director; appeals from action by the regional director; statement in opposition to appeal; transfer of case to Board; proceedings before the Board; Board action.—(a) The regional director may proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as he may deem proper, to determine the unit appropriate for the purpose of collective bargaining, to determine whether a question concerning representation exists, and to direct an election, dismiss the petition, or make other disposition of the matter. Any party desiring to submit a brief to the regional director

shall file the original and one copy thereof, which may be a typed carbon copy, within 7 days after the close of the hearing: Provided, however, That prior to the close of the hearing and for good cause, the hearing officer may grant an extension of time not to exceed an additional 14 days. Requests for additional time in which to file a brief under authority of this section not addressed to the hearing officer during the hearing shall be made to the regional director, in writing, and copies thereof shall immediately be served on the other parties. Requests for extension of time shall be made not later than 3 days before the date such briefs are due in the regional office. No reply brief may be filed except upon special leave of the regional director.

(b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final; Provided, however, That within 10 days after service thereof any party may file eight copies of a request for review with the Board in Washington, D. C. Such request shall be printed or otherwise legibly duplicated; Provided, however, That carbon copies shall not be filed and if submitted will not be accepted. Copies thereof shall be served simultaneously on all other parties to the proceeding and the regional director in the same manner used to file with the Board, except that if personal service is made upon the Board, service upon the other parties shall be made in such manner as would reasonably insure receipt by the other parties within 3 days after the date of service upon the Board. A statement of such service shall be filed simultaneously with the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate

as a stay of any action taken or directed by the regional director; Provided, however, That the regional director, in the absence of a waiver, may issue a notice of election but shall not conduct any election or open and count any challenged ballots until the Board has ruled upon any request for review which may be filed.

(c) The Board will grant request for review only where compelling reasons exist therefor. Accordingly a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or

allege any facts not timely presented to the regional director.

(e) Any party may, within 7 days after the last day on which the request for review must be filed, file with the Board eight copies of a statement in opposition thereto, which shall be duplicated and served in accordance with the requirements of paragraph (b) of this section; except that if personal service of the request for review is made upon the Board, 10 days will be allowed. However, 3 days will not be added to either of the aforesaid prescribed periods as provided in section 102.114. A statement of such service of opposition shall be filed simultaneously with the Board. The Board may deny the request for review without awaiting a statement in opposition thereto.

(f) The parties may, at any time, waive the right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

(g) The granting of a request for review shall not stay the regional director's decision unless otherwise ordered by the Board. Within 7 days after the issuance of an order granting review, the appellants and other parties may file eight copies of a brief with the Board, which shall be duplicated and served in accordance with the requirements of paragraph (b) of this section. A state-

ment of such service shall be filed simultaneously with the Board. Such briefs may be reproductions of those previously filed with the regional director and/or other briefs which shall be limited to the issues raised in the request for review. Where review has been granted, the Board will consider the entire record in the light of the grounds relied upon for review. Any request for review may be withdrawn with the permission of the Board at any time prior to the issuance of the decision of the Board thereon.

(h) In any case in which it appears to the regional director that the proceeding raises questions which should be decided by the Board, he may, at any time, issue an order, to be effective after the close of the hearing and before decision, transferring the case to the Board for decision. Such an order may be served on the parties upon the record of the hearing.

(i) If any case is transferred to the Board for decision after the parties have filed briefs with the regional director, the parties may, within such time after service of the order transferring the case as is fixed by the regional director, file with the Board eight copies of the brief previously filed with the regional director. Such copies shall be printed or otherwise legibly duplicated: Provided, however, That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. No further briefs shall be permitted except by special permission of the Board. If the case is transferred to the Board before the time expires for the filing of briefs with the regional director and before the parties have filed briefs, such briefs shall be filed as set forth above and served

in accordance with paragraph (b) of this section, within the time set by the regional director. If the order transferring the case is served upon the parties during the hearing, the hearing officer may, prior to the close of the hearing and for good cause, grant an extension of time within which to file a brief with the Board for a period not to exceed an additional 14 days. Requests for extension of time in which to file a brief with the Board under authority of this section not addressed to the hearing officer during the hearing shall be filed in writing with the Board and copies thereof shall immediately be served on each of the other parties and the regional director. Requests for extension of time shall be received by the Board not later than 3 days before the date such briefs are due in Washington, D.C. A copy of any such requests shall be served immediately on each of the other parties and the regional director and shall contain a statement that such service has been made. No reply brief may be filed except upon special leave of the Board.

(j) Upon transfer of the case to the Board, the Board shall proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as it may determine, to decide the issues referred to it or to review the decision of the regional director, and shall direct a secret ballot of the employees, dismiss the petition, affirm or reverse the regional director's order in whole or in part, or make such other disposition of the matter as it deems appropriate.

Sec. 102.68 Record; what constitutes; transmission to Board. — The record in the proceeding shall consist of: the petition, notice of hearing with affidavit of service

thereof, motions, rulings, orders, the stenographic report of the hearing and of any oral argument before the regional director, stipulations, exhibits, documentary evidence, affidavits of service, depositions, and any briefs or other documents submitted by the parties to the regional director, if any. Immediately upon issuance by the regional director of an order transferring the case to the Board, or upon issuance of an order granting a request for review by the Board, the regional director shall transmit the record to the Board.

§ 102.69 *Election procedure; tally of ballots; objections; certification by regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing.*—(a) Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the regional director in whose region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the regional director, whose decision shall be final, have its name removed from the ballot: Provided, however, That in a proceeding involving an employer filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties, and the regional director, disclaiming any representation interest among the employees in the unit. Any party may be represented by observers of his own selection, subject to such limitations as the regional director may prescribe. Any party and Board agents may challenge,

for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election, the regional director shall cause to be furnished to the parties a tally of the ballots. Within 5 days after the tally of ballots has been furnished, any party may file wth the regional director an original and three copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objections shall immediately be served upon each of the other parties by the party filing them, and proof of service shall be made.

(b) If no objections are filed within the time set forth above, if the challenged ballots are insufficient in number to affect the result of the election, and if no runoff election is to be held pursuant to section 102.70, the regional director shall forthwith issue to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board, and the proceeding will thereupon be closed.

(c) If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections or challenges, or both. If a consent election has been held pursuant to section 102.62(b) the regional director shall prepare and cause to be served

upon the parties a report on challenged ballots or objections, or both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board in Washington, D.C. Within 10 days from the date of issuance of the report on challenged ballots or objections, or both, or within such further period as the Board may allow upon written request to the Board for an extension made not later than 3 days before such exceptions are due in Washington, D. C., with copies of such request served on each of the other parties, any party may file with the Board in Washington, D.C., eight copies of exception to such report, with supporting brief if desired, which shall be printed or otherwise legibly duplicated, except that carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof together with a copy of any brief filed on the other parties and shall file copies with the regional director. A statement of service shall be made to the Board simultaneously with the filing of exceptions. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further period as the Board may allow, a party opposing the exceptions may file an answering brief with the Board in Washington, D.C.; except that if personal service of the exceptions and any supporting brief is made upon the Board, 10 days will be allowed. However, 3 days as provided in section 102.114, will not be added to the prescribed time for filing an answering brief. Such brief shall be submitted in eight copies, printed or otherwise legibly duplicated, except that carbon copies shall not be filed and if submitted will not be accepted. Immediately upon the filing of such brief, the party filing

the same shall serve a copy thereof on the other parties and shall file a copy with the regional director. A statement of service shall be made to the Board simultaneously with the filing of the answering brief. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The report on challenged ballots may be consolidated with the report on objections in appropriate cases. If the election has been conducted pursuant to a direction of election issued following any proceeding under section 102.67, the regional director may (1) issue a report on objections or challenged ballots or both, as in the case of a consent election pursuant to paragraph (b), or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election. In either instance, such action by the regional director may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer. If the regional director issues a report on objections and challenges, the parties shall have the rights set forth in subsection (c) and paragraph (e) of this section; if the regional director issues a decision, the parties shall have the rights set forth in section 102.67 to the extent consistent herewith. (As amended effective July 4, 1967)

(d) Any hearing pursuant to this section shall be conducted in accordance with the provisions of sections 102.64,

102.65, and 102.66, insofar as applicable, except that upon the close of such hearing, the hearing officer shall, if directed by the regional director, prepare and cause to be served upon the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. In any case in which the regional director has directed that a report be prepared and served, any party may, within 10 days from the date of issuance of such report, file with the regional director the original and one copy, which may be a carbon copy, of exceptions to such report, with supporting brief, if desired. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the regional director. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Board may allow, a party opposing the exceptions may file an answering brief with the regional director; except that if personal service of the exceptions and any supporting brief is made upon the Board, 10 days will be allowed. However, 3 days as provided in section 102.114 will not be added to the prescribed time for filing an answering brief. An original and one copy, which may be a carbon copy, shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the regional director. If no exceptions are filed to such report, the regional director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

(e) (1) In a case involving a consent election held pur-

suant to section 102.62(b), if exceptions are filed, either to the report on challenged ballots of objections, or both if it be a consolidated report, and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other disposition of the case. If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served upon the parties a notice of hearing on said exceptions before a hearing officer. The hearing shall be conducted in accordance with the provisions of sections 102.64, 102.65, and 102.66, insofar as applicable. Upon the close of the hearing the agent conducting the hearing, if directed by the Board, shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations to the Board as to the disposition of the challenges or objections, or both if it be a consolidated report. In any case in which the Board has directed that a report be prepared and served, any party may within 10 days from the date of issuance of the report on challenged ballots or objections, or both, or within such further period as the Board may allow, upon written request to the Board for an extension received not later than 3 days before such exceptions are due in Washington, D.C., with copies of such request served on the other parties, file with the Board in Washington, D.C., eight copies of exceptions to such report, with supporting brief if desired, which shall be printed or otherwise legibly duplicated, except that carbon copies of typewritten matter shall not be filed and if submitted will not be accepted.

Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof together with a copy of any brief filed, on the other parties and shall file copies with the regional director. A statement of service shall be made to the Board simultaneously with the filing of exceptions. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further period as the Board may allow, a party opposing the exceptions may file an answering brief with the Board in Washington, D. C.; except that if personal service of the exceptions and any supporting brief is made upon the Board, 10 days will be allowed. However, 3 days as provided in section 102.114 will not be added to the prescribed time for filing an answering brief. Such brief shall be submitted in eight copies, printed or otherwise legibly duplicated, except that carbon copies shall not be filed and if submitted will not be accepted. Immediately upon the filing of such brief, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the regional director. A statement of service shall be made to the Board simultaneously with the filing of the answering brief. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The Board shall thereupon proceed pursuant to section 102.67.

Provided, However, That in any proceeding wherein a representation case has been consolidated with an unfair labor practice case for purposes of hearing, the provisions of section 102.46 of these rules shall govern with respect to the filing of exceptions or an answering brief to the

exceptions to the trial examiner's decision. (As amended effective July 4, 1967)

(f) The notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exceptions, documentary evidence, all of which, together with the objections to the conduct of the election or conduct affecting the results of the election, any report on such objections, any report on challenged ballots, exceptions to any such report, any briefs or other documents submitted by the parties, the decision of the regional director, if any, and the record previously made as described in section 102.68, shall constitute the record in the case. Immediately upon issuance of a report on objections or challenges, or both, upon issuance by the regional director of an order transferring the case to the Board, or upon issuance of an order granting a request for review by the Board, the regional director shall transmit the record to the Board. (As amended, effective September 3, 1963)

(g) In any such case in which the regional director or the Board, upon ruling on challenged ballots, has directed that such ballots be opened and counted and a revised tally of ballots issued, and no objection to such revised tally is filed by any party within 3 days after the revised tally of ballots has been furnished, the regional director shall forthwith issue to the parties certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board. The proceeding shall thereupon be closed.

(h) Notwithstanding paragraph (c) and (e) of this section to the contrary, if the regional director decides that a hearing on objections or challenged ballots in a con-

sent election held pursuant to section 102.62(b) is necessary, he may direct a hearing before a hearing officer, or a trial examiner if the case is consolidated with an unfair labor practice proceeding. Such action on the part of the regional director shall constitute a transfer of the case to the Board, and the provisions of section 102.65(c) shall apply with respect to special permission to appeal to the Board from any such direction of hearing.

Exceptions, if any, to the hearing officer's report or to the trial examiner's decision, and any answering brief to such exceptions, shall be filed with the Board in Washington, D.C., in accordance with paragraph (e) of this section.

§ 102.70 *Runoff election*—(a) The regional director shall conduct a runoff election, without further order of the Board, when an election in which the ballot provided for not less than three choices (i.e., at least two representatives and "neither") results in no choice receiving a majority of the valid ballots cast and no objections are filed as provided in section 102.69. Only one runoff shall be held pursuant to this section.

(b) Employees who were eligible to vote in the election and who are in an eligible category on the date of the runoff election shall be eligible to vote in the runoff election.

(c) The ballot in the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of votes.

(d) In the event the number of votes cast in an inconclusive election in which the ballot provided for a choice

among two or more representatives and "neither" or "none" is equally divided among the several choices; or in the event the number of ballots cast for one choice in such election is equal to the number cast for another of the choices but less than the number cast for the third choice, the regional director shall declare the first election a nullity and shall conduct another election, providing for a selection from among the three choices afforded in the original ballot; and he shall thereafter proceed in accordance with paragraphs (a), (b), and (c) of this section. In the event two or more choices receive the same number of ballots and another choice receives no ballots and there are no challenged ballots that would affect the results of the election, and if all eligible voters have cast valid ballots, there shall be no runoff election and a certification of results of election shall be issued. Only one such further election pursuant to this paragraph may be held.

(e) Upon the conclusion of the runoff election, the provisions of section 102.69 shall govern, insofar as applicable.

§ 102.71 *Refusal to issue notice of hearing; appeals to Board from action of the regional director.*—If, after a petition has been filed, and prior to the close of the hearing, it shall appear to the regional director that no further proceedings are warranted, the regional director may dismiss the petition by administrative action and so advise the petitioner in writing, accompanied by a simple statement of the procedural or other grounds for the dismissal. The petitioner may obtain a review of such action by filing a request therefor with the Board in Washington, D.C., and filing a copy of such request with the regional director and the other parties within 10 days of service of such notice of

dismissal. The request shall be submitted in eight copies and shall contain a complete statement setting forth the facts and reasons upon which the request is based. Requests for an extension of time within which to file the request for review shall be filed with the Board in Washington, D.C., and a statement of service shall accompany such request.

§ 102.72 *Filing petition with general counsel; investigation upon motion of general counsel; transfer of petition and proceeding from region to general counsel or to another region; consolidation of proceedings in same region; severance; procedure before general counsel in cases over which he has assumed jurisdiction.*—Whenever it appears necessary in order to effectuate the purposes of the act, or to avoid unnecessary costs or delay, the general counsel may permit a petition to be filed with him in Washington, D.C., or may at any time after a petition has been filed with a regional director pursuant to section 102.60 order that such petition and any proceeding that may have been instituted with respect thereto:

(a) Be transferred to and continued before him, for the purpose of investigation or consolidation with any other proceeding which may have been instituted in a regional office or with him; or

(b) Be consolidated with any other proceeding which may have been instituted in the same region; or

(c) Be transferred to and continued in any other region, for the purpose of investigation or consolidation with any proceeding which may have been instituted in or transferred to such region; or

(d) Be severed from any other proceeding with which it may have been consolidated pursuant to this section.

The provisions of sections 102.60 to 102.71, inclusive, shall, insofar as applicable, apply to proceedings before the general counsel pursuant to this section, and the powers granted to regional directors in such provisions shall, for the purpose of this section, be reserved to and exercised by the general counsel. After the transfer of any petition and any proceeding which may have been instituted in respect thereto from one region to another pursuant to this section, the provisions of this subpart shall, insofar as applicable, govern such petition and such proceeding as if the petition had originally been filed in the region to which the transfer is made.

The regional director may exercise the powers in subsections (b) and (d) of this section with respect to proceedings pending in his region. (As amended effective July 4, 1967)